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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 49

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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Opinions Below.

The opinion below of the United States Circuit Court of Appeals for the Seventh Circuit is officially reported at 103 Fed. (2d) 110; and that of the United States Board of Tax Appeals is officially reported at 37 B. T. A. 314.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The order of reversal was entered by the Circuit Court of Appeals February 25, 1939 (R. 91).

The petitioner's petition for rehearing was denied by the Circuit Court of Appeals April 15, 1939 (R. 92). The petition for certiorari was filed in this Court May 10, 1939 and granted October 13, 1939.

Statement of the Case.

Petitioner commenced this case by filing a petition with the United States Board of Tax Appeals (R. 2 to 8) seeking the review of a proposed deficiency of $61,219.97 in the petitioner's individual income tax for the year 1933. The only contested issue arises from the proposed inclusion, as the petitioner's individual income, of $73,558.93 of profits which the petitioner is charged with having realized, individually, from a sale of 5000 shares of stock in Oakridge Cemetery Corporation, which sale the United States Board of Tax Appeals has found to have been made by G. W. G. Corporation, a Company wholly owned by the petitioner.

In the year 1926 the petitioner had purchased these 5000 shares of stock from or through one Lay at a cost of $100,000. In 1931 he had claimed and been allowed a deduction of $92,500 as a loss realized from the sale of the same shares to John Griffiths Investment Trust for $7,500 (R. 13).

In the latter part of 1932, petitioner acquired information that fraud had been practiced upon him in 1926 when he purchased this stock. One Markheim, petitioner's attorney, undertook investigation and negotiation; and he later reported that a settlement was in prospect which would involve the resale of this stock to Lay and a release of petitioner's cause of action for fraud. On his advice petitioner repurchased the stock from the trust for $8,000, thus combining in himself ownership of the stock and of the claim for fraud (R. 13, 14, 15, 17).

Markheim, at the same time told petitioner that the payment of income taxes on the profit from the settlement might be postponed, and their amount limited, if an investment company should be organized to which petitioner would sell the stock and the cause of action on an installment basis, which company would make the settlement and then use the proceeds in its business (R. 14, 15). The petitioner had already been considering forming an investment corporation or association (R. 14); and he then instructed Markheim to proceed (R. 15).

G. W. G. Corporation was organized on January 10, 1933, petitioner being its sole stockholder. Immediately following its organization, its Directors authorized the execution of an agreement by which petitioner was to sell to it the 5,000 shares of stock and assign to it such rights as he might have to require Lay to repurchase the stock; and G. W. G. Corporation was to pay petitioner therefor the sum of $85,000. Payment was to be made, $1,000 down, $1,125 five days later, and $2,125 on the fifteenth day of January of each year thereafter, deferred installments bearing three per cent (3%) interest. The agreement bears the same date as the meeting (Ex. 2a, R. 48, 50, in evidence R. 14).

Markheim finished his negotiations; and on the following day a settlement contract was completed and executed (R. 15, 18). Thereupon, Markheim received from Lay two checks, one for $80,000 (arising from matters not in question), and one for $100,000. The next day the latter check was deposited to the credit of G. W. G. Corporation, in an account which that Company had opened two days before in National Builders Bank of Chicago (R. 15, and 18, also Exhibit 4, R. 57, in evidence R. 16).

G. W. G. Corporation thereafter proceeded to obtain a license to transact business in the State of Illinois. During

the remainder of the year 1933 it made investments totaling over $175,000 in stocks of National Dairy Products, Union Carbide and Carbon, Eastman Kodak, Youngstown Sheet and Tube, and Chapin & Gore. (See Exhibit 5, R. 59, in evidence R. 16, which shows each investment made in the year 1933, and the dates of sale of such of these items as have been sold.)

In his 1933 individual income tax return petitioner reported this sale to G. W. G. Corporation as a sale on an installment basis, returning $1,875 (of the $2,125 collected on principal in that year) as profit realized, and $75,000 as profit as yet unrealized (Exhibit 2a, R. 22 and 30, in evidence R. 14).

In this 1933 return, petitioner also reported $20,000 of income received as dividends from G. W. G. Corporation, $10,000 received as salary as its Treasurer, and interest received as $1,436.15. The latter item presumably included $1,243.13 of interest, on the deferred payments, received from G. W. G. Corporation in December 1933 (Exhibit 2-a, R. 22, 27 and 29, in evidence R. 14).

In his deficiency letter, the Commissioner, respondent herein, treated the sale to Lay by G. W. G. Corporation as a sale made by petitioner individually, charging him with the entire profit less the above mentioned item of $1,875, but making no allowance or deduction to offset his return of interest, dividends and salary from G. W. G. Corporation. He stated his reason for the increase in income as follows:

> "The alleged assignment of this stock to G. W. G. Corporation (organized on the day of the sale, January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account." (R. 7.)

The United States Board of Tax Appeals, in its opinion

romulgated on February 9, 1938 (six members dissent-
ng), made the following statement:

"It requires careful scrutiny to see if there is any sufficient reason to disregard the corporate entity, which normally under the law must be recognized as a separate taxpayer from the petitioner. It is not fatal in such cases that the corporation was used deliberately to minimize income taxes. Here one taxpayer, the petitioner, made an actual bona fide sale to another. His income tax liability arises under that transaction rather than as a result of the settlement with Lay. This new corporation continued to exist, as indeed was necessary in order to carry the installment sale contract. It paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded." (R. 67.)

On petition by the Commissioner, the United States Cir-
uit Court of Appeals for the Seventh Circuit reversed the
ecision of the Board of Tax Appeals, treating the resale
o Lay as an individual transaction on the authority of
regory v. *Helvering*, 293 U. S. 465, and saying:

"Here, as there," (in *Gregory* v. *Helvering*) "the sole object was the consummation of a preconceived plan not to organize a corporation for a business purpose, but merely as a step in the contrivance to escape taxes. It performed, as was intended from the beginning, no other function, *with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part.*" (Italics ours.) (R. 88.)

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Seventh Circuit erred in the following particulars:

(1) In interpreting the decision of *Gregory* v. *Helvering*, 293 U. S. 465, as calling for the disregard of the legal entity of a corporation, as separate from its stockholders, if income tax saving is a leading motive for its incorporation.

(2) In its attempted application of the principles of law announced in *Gregory* v. *Helvering* to a situation presenting issues dissimilar to those there decided, and not of the kind intended to be governed thereby.

(3) In professing to distinguish the decision of *Chisholm* v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2d Cir.) on the facts, when in respect to the facts the cases are exactly parallel.

(4) In treating the receipt of funds by a corporation, in a corporate transaction, as income to its sole stockholder, merely because of his complete control over the corporation.

(5) In assuming facts not supported by, and even in conflict with, the findings of fact of the United States Board of Tax Appeals.

(6) In arriving at a decision based on its own conclusions of fact, which are contrary to the conclusions of the Board and are not sustained by the record.

(7) In reversing the decision of the United States Board of Tax Appeals upon a question of fact.

(8) In failing to affirm the decision of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

A. Statutes Involved.

(From Revenue Act of 1932.)

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals (referring to those with incomes above minimum) shall each make under oath a return stating specifically the items of *his gross income* and the deductions and credits allowed under this title— • • •

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this title shall make a return, stating specifically the items of *its gross income* and the deductions and credits allowed by this title. • • •,

SEC. 44. INSTALLMENT BASIS.

• • • • • •

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case of a cash sale or disposition of personal property for a price exceeding $1,000 • • • if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, • • • be returned on the basis and in the manner above provided in this section. • • •

NOTE: Clauses (a) and (c) relate to those regularly selling on the installment basis. Clause (d) provides for an acceleration of the time when the balance of the profit on an installment obligation shall be returned in certain contingencies, such as the sale of the obligation or its transmission at the death of the obligee.

B. Points and Authorities.

1. The transaction in question is a casual sale of personalty on the installment plan; and is reflected in the return in accordance with the statute.

Section 44. Revenue Act of 1932.

2. The existence of a corporation, as a legal entity, may not be disregarded merely because a tax saving motive attended its organization.

Gregory v. *Helvering*, 293 U. S. 465.

Chisholm v. *Commissioner*, 79 Fed. (2d) 14, (C. C. A. 2d Cir.).

Helvering v. *Johnson*, 104 Fed. (2d) 141, (C. C. A. 8th Cir.).

3. The fact that petitioner controlled the corporation, to which the sale was made, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Burnet v. *Commonwealth Improvement Company*, 287 U. S. 415 (418-420).

Dalton v. *Bowers*, 287 U. S. 404, (407-8).

Smith v. *Higgins*, 102 Fed. 2d, 456 (C. C. A. 2d Cir.).

Commissioner v. *Eldridge*, 79 Fed. (2d) 629.

Grand Rapids Trust Co. v. *Commissioner*, 34 B. T. A. 170.

4. As to facts:

(a) The findings of fact of United States Board of Tax Appeals, are conclusive upon the United States Circuit Court of Appeals, they being sustained by substantial evidence.

Phillips v. *Commissioner*, 283 U. S. 589 (600).

California Barrel Co. v. *Commissioner*, 81 Fed. 2d 190 (193) (C. C. A. 9th Cir.).

(b) The conclusions of fact drawn by the Circuit Court of Appeals should be disregarded.

Elmhurst Cemetery Company v. *Commissioner*, 300 U. S. 37 (40).

Helvering v. *Rankin*, 295 U. S. 123 (131).

Van's Investment Co. Limited as Commissioner, 92 Fed. (2d) 861 (C. C. A. 9th Cir.).

ARGUMENT.

1. Petitioner's sale to G. W. G. Corporation, of the stock and right to require its purchase, was properly reflected in his income tax return.

If, as we contend, the petitioner's sale to G. W. G. Corporation was genuine (the sale to Lay being made by that corporation) we do not think there will be any question of the correctness of petitioner's return in treating his sale to G. W. G. Corporation as a casual sale on the installment plan. (See Sec. 44 Revenue Act of 1932.)

Obviously, if the sale to Lay should be treated as made by petitioner individually, as is claimed by the respondent, all elements of petitioner's reported profit, derived from G. W. G. Corporation, should have been excluded from his individual income. Respondent did exclude the reported profit in the principal installment received from G. W. G. Corporation in 1933, but he retained, in petitioner's individual income, interest on the deferred installments received in 1933 from G. W G. Corporation as well as dividends and salary paid to petitioner by that company.

As pointed out by the Board of Tax Appeals, respondent occupies the inconsistent position of seeking to add $73,558.92 to petitioner's income, on the theory that the controlled corporation was merely his "corporate pocket" (so termed by the Circuit Court of Appeals), but of retaining, in petitioner's reported individual income, $33,118.13 of the $34,933.13, on the receipt of which, in that same year from this same "corporate pocket," he has already paid income tax.

. The existence of a corporation, as a legal entity, may not be disregarded merely because a tax saving motive attended its organization.

Confessedly, a tax saving motive attended petitioner's organization of G. W. G. Corporation at this particular time. It was not his sole motive, nor were the corporation's activities limited to the transaction here in question.

Respondent would have the corporation's transaction treated as respondent's own on the basis of this Court's statement, in *Gregory* v. *Helvering*, 293 U. S. 465, that what was there claimed to be a "reorganization" was an operation having no business or corporate purpose.

It cannot be denied that G. W. G. Corporation was a real corporation. It made investments, realized profits (and in some cases losses), declared dividends, paid salary (Ex. 5 R. 59, in evidence R. 16).

In *Gregory* v. *Helvering* itself this Court recognized the "legal right of a taxpayer to decrease the amount of what otherwise would have been his taxes, or altogether avoid them by means which the law permits" (p. 469). In a multitude of cases the "means selected" have included the organization of a corporation, association, or partnership; and the saving has been sustained. We mention two from a multitude of such decisions.

We cite *Chisholm* v. *Commissioner* (cited by the Circuit Court of Appeals in the instant case) because of the striking parallel of its facts with those in the instant case and the Court's incisive analysis of the decision in *Gregory* v. *Helvering*.

In the Chisholm case, as in the instant case:

(a) The taxpayers anticipated the sale of a stock which if sold by them as individuals would result in heavy income taxes.

In the Chisholm case they had given a thirty day option, and the optionee had later indicated that the option would be exercised (79 Fed. 2d 14). In the instant case the taxpayer's attorney had expressed the opinion that Lay would repurchase the stock (R. 17).

(b) Each taxpayer had considered the formation of an investment company; whether a partnership, association, or corporation is immaterial (79 C. C. A. 2d 15, and R. 14).

(c) The taxpayers' attorneys had informed them that tax saving, postponement or reduction, might be effected if such an investment concern were then organized, which would acquire the stock from the taxpayers and thereafter sell it (79 C. C. A. 2d 15 and R. 14-15).

The Circuit Court of Appeals said, in the Chisholm case:

> "True, it is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. In *Gregory* v. *Helvering*, *supra*, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draft the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped, whatever other aim they might have had, whether to avoid taxes, or to regenerate the world."

In the case of *Helvering* v. *Johnson*, 104 Fed. 2d 141 (C. C. A. 8th Cir.), also pending in this court on certiorari, the taxpayer had caused a corporation to be organized

whose stock was owned by him and his wife. He sold certain stock to that corporation and claimed a loss on his income tax return.

The Board held that the sale was "an actual bona fide" one, four members of the Board dissenting on the ground that the corporation had not been organized "for the purpose of carrying on a business, and in fact did not carry on a business."

The Circuit Court of Appeals affirmed the Board's decision for the taxpayer, stating "that the respondent and the Investment Company were distinct entities is not questioned" (citing *Burnet* v. *Clark*, 287 U. S. 410; *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415; *Klein* v. *Board Supervisor*, 282 U. S. 19, and *Jones* v. *Helvering*, 71 Fed. (2d) 214, 217). "The Corporation has remained in existence. It has retained the Shoe Company stock which it acquired in 1933. The number of stockholders of the Investment Company is unimportant" (citing *Cannon Manufacturing Company* v. *Cudahy*, 267 U. S. 333, and *Burnet* v. *Commonwealth Improvement Company*, *supra*) "except that it shows that the Investment Company was not organized merely for the purpose of enabling the respondent to take a loss and still retain the beneficial ownership of the stock sold. His wife acquired rights as a stockholder in the investment which could not be ignored by him" (*Eisner* v. *Macomber*, 252 U. S. 189). "By the sale of the stock of the Shoe Company to the Investment Company the respondent was divested of all property rights in the stock in return for the proceeds of the sale (Page 143)."

3. The fact that petitioner controlled the corporation, to which the sale was made, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Since the decision in *Gregory* v. *Helvering* there have been repeated attempts to apply its statement that "artifice" must not be "exalted above reality," to facts to which this statement has no application except through distortions of the words "artifice" and "reality."

The "reality" in this case is that a corporation, G. W. G. Corporation, acquired certain stock under a valid contract, sold it for a valid consideration, and used the proceeds in its business. Each transaction in which petitioner, its stockholder, might thereafter acquire its funds would have income tax consequences for him, even without regard to the probable previous payment by the corporation of tax on substantially the same funds. In fact, the taxable income which petitioner reported, in 1933 alone, as realized from and through the corporation, exceeded 47½% of the increase in his income proposed by respondent.

Efforts to disregard, for income tax purposes, the existence of a wholly owned corporation as an entity distinct from its controlling stockholder, have been before the courts almost innumerable times. In this Court, at least, the decisions are uniform that the unity of ultimate interest does not justify the amalgamation of the corporation with its stockholder.

In *Dalton* v. *Bowers*, 287 U. S. 404 (407-8), and *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415 (418-420), it was the taxpayers who had chanced to find it to their advantage that the profits or losses of solely owned corporation should be treated as sustained by them as individuals. This Court applied the rule to the contrary, the same as it has applied it when the Commissioner

of Internal Revenue has sought to disregard the legal separateness of the corporation.

"The rule is well settled that the corporation will be looked upon as a legal entity." (287 U. S. 408.)

"The fact is that petitioner did have a separate legal existence with privileges and obligations entirely separate from those of its stockholders. *The fact that it had only one stockholder seems of no legal significance.*" (287 U. S. 419.)

In the case of *Smith* v. *Higgins, Collector,* 102 Fed. 2d. 456 (also pending in this Court on certiorari), the Circuit Court of Appeal for the Second Circuit said:

"However closely the plaintiff controlled Innisfail as its sole stockholder, and he was also its president, it is clear that that corporation had for years before this transaction bought, sold, and held, and did thereafterwards buy, sell, and hold, large amounts of securities. It had a business existence and was a corporate entity separate and distinct by itself with assets and liabilities of its own part from those of its sole stockholder. *And the fact that it had but one stockholder did not prevent its having such a separate legal status. Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415. * * * As such a corporation, it was in law a legal person whose acts were its own in making the purchase of these securities and when the purchase was made and the shares transferred to it Innisfail was the sole owner of them. * * * The existence of a motive to reduce or avoid taxation by making a valid sale is of no consequence for the plaintiff had the right to give effect to that purpose by whatever lawful means he had available. *Gregory* v. *Helvering,* 293 U. S. 465" (R. 457-8).

In *Commissioner* v. *Eldridge,* 79 Fed. (2d) 629, C. C. A. 9th Cir., the taxpayer sold stock to a controlled corporation at its then market value, and claimed deductions representing losses thereon.

The Board held that the deductions were allowable and its decision was sustained by the Circuit Court of Appeals:

"The facts found by the Board of Tax Appeals in

this case do not, in our opinion, warrant us in disregarding the separate entity of the corporation. The fact that respondents owned all its stock and were in complete control of it is no reason for disregarding its separate entity." (Citing decisions.)

"It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability." (Citing decisions which include *Gregory* v. *Helvering*.) (p. 631.)

Grand Rapids Trust Company, et al., administrators v. *Commissioner*, 34 B. T. A. 170, is a case decided for the taxpayer on facts exactly parallel with those in the instant case. It involves an individual's sale of securities to a controlled corporation on the installment plan and their resale by the corporation. It does not appear that the Commissioner sought a further review of that case although he did not acquiesce in the Board's decision. We quote:

"The respondent's determination, as has been seen, was predicated upon a complete disregard of the assignment by Smith to the corporation, the reason for such disregard being the alleged full control by Smith of the corporation. The separateness of Smith and the corporation as juristic entities and also as taxpayers cannot be disputed, and there is no evidence which would justify lack of recognition of either. *Burnet* v. *Clark*, 287 U. S. 410. The corporation, so far as appears, was not merely a technical legal entity but was a substantial being which had been carrying on business for many years before the transaction with Boyle. It cannot be regarded as a mere ephemeral taxsaving device, as in *Gregory* v. *Helvering*, 293 U. S. 465, even if such a characterization justified its disregard. Although transactions between an individual and a corporation controlled by him, like intra family transactions, always invite close scrutiny to ascertain their genuineness, *Commissioner* v. *Eldridge*,

79 Fed. (2d) 629, the relation between participants is not alone sufficient to require that transactions between them be ignored." (p. 171.)

In this connection we note that the citations of the instant case by the United States Board of Tax Appeals present an interesting contrast. Prior to its reversal by the Circuit Court of Appeals, the Board twice cited its decision in this case with approval. (*W. & K. Holding Corporation*, 38 B. T. A. 830 and *Mead Corporation*, 38 B. T. A. 687.)

Since its reversal the Board has cited the reversing decision of the Circuit Court of Appeals with approval in the appeals of *Von's Investment Co., Ltd.*, 39 B. T. A. 1141, *Jackson*, 39 B. T. A. 937, and *Loewenberg*, 39 B. T. A. 844. The last named of these appeals is the only one arising on facts or with issues closely similar to those in the case at bar; and three members dissent from that decision. The Circuit Court's decision in the instant case, is last cited in a dissent from the Board's decision on the appeal of Smith, which will appear as decision No. 67 in 40 B. T. A.

In the Smith case, the Board had before it the square question whether it should disregard the legal consequences, for tax purposes, of a sale to be a controlled corporation. The majority decision of the Board is that the separateness of the corporation should not be disregarded. There is an extended dissenting opinion, contending for the disregard of the separate corporate entity when it is "an anticipatory arrangement" with tax consequences in view,—a characterization equally applicable to the selections of the forms in which most important business transactions are accomplished. In this dissenting opinion the minority of the Board distinguishes *Smith* v. *Higgins* (cited above), which arose with respect to sales to the

very same corporation by the same stockholder, on the ground that in the prior case a jury had found the sales to be genuine, while the dissenting members felt that the Board should find otherwise as to the sales on which it was to pass (p. 16),—which illustrates the confusion which will result if the genuineness of transactions is made dependent on the motives which impelled them.

We submit that it is an utter perversion of the principle that "substance rather than form should control," to claim that it justifies treating the receipt of money by a controlled corporation as individual profit to its stockholder. In stating that the stockholder could terminate the corporate plan "almost as rapidly as he created it," in its decision in the instant case, the Circuit Court overlooked the fact that every corporate termination has direct income tax consequences for its stockholders,—which should not be if a stockholder's "effective domination and control" over the corporate funds is to make them income to him when first received by the corporation.

4. As to the facts.

Facts as found by the United States Board of Appeals, if sustained by substantial evidence, are conclusive upon Circuit Courts of Appeals. To the extent that the opinion of the United States Circuit Court of Appeals in the instant case reflects material departures from the facts as found, that Court has fallen into error. Naturally, citations of its opinion, in subsequent cases, are based on its version of the facts, and should be accepted with caution.

We therefore call the Court's attention to certain of the findings of the United States Board of Tax Appeals, and one statement of fact from the opinion proper:

"The petitioner, prior to 1933, had had some

thoughts relating to the formation of an investment corporation or association similar to that known as The John Griffiths Investment Trust. He instructed Markheim, on January 9, 1933, to form an investment corporation as Markheim had suggested" (Rec. 61).

"The G. W. G. Corporation in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 64).

"It" (the corporation) "paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. *The steps taken and the reality of the corporation cannot* be disregarded" (Rec. 67).

The following is from the opinion of the Circuit Court of Appeals. The italicized observations of fact appear to us to be both contrary to the Board's findings and without support in the record:

"Here, as there, *the sole object* was the consummation of a preconceived plan *not to organize a corporation for a business purpose*, but merely as a step in the contrivance to escape taxation. *It performed, as was intended from the beginning, no other function with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part*" (Rec. 88).

"We are presented with a situation in which the taxpayer and his counsel intentionally *formulated a contrivance for the sole purpose* of enabling the taxpayer to avoid the payment of tax" (Rec. 87).

The testimony, "I had had in mind the forming of such a corporation over a period of some time; having had considerable to do with the John Griffiths Investment Trust, I was a little familiar with such corporations • • •" (Rec. 14) affords sufficient basis for the first quotation from the Board's decision. The reality of the Corporation is demonstrated by its 1933 investments, totalling

over $175,000 in addition to the purchase here in dispute. (Petitioner's Exhibit 5, Rec. 79, In evidence at Record 16.) There is no justification for the Circuit Court's characterization of such investments as a "possible exception of transacting some other business."

It may be presumed that, throughout its corporate existence, G. W. G. Corporation has complied with the law by making returns and paying Income, Capital Stock, and other taxes;—also that its controling stockholder has, in his returns, accounted for all moneys received from it. There is affirmative evidence that he did so for the year 1933. If G. W. G. Corporation is not to be considered a corporation "organized for a business purpose," the question is pertinent whether it should have been treated as a corporation for any purpose of Federal taxation. If at one stage of its existence it be regarded as a corporation, and at another as no corporation,—just when did the change occur, and what are the criteria of the change?

Such problems would not have arisen in the instant case, nor could the Circuit Court of Appeals have arrived at the decision under review, if it had observed the law as established by the decisions we now discuss.

A. *The findings of fact of the United States Board of Tax Appeals, quoted above, are conclusive, they being based on substantial evidence.*

In *Phillips* v. *Commissioner*, 283 U. S. 589, this Court was asked to pass on the constitutionality of the procedure specified in the Revenue Act for enforcing the collection of taxes, assessed against a corporation, from transferees of its assets.

One objection urged was that the assessment against the alleged transferee preceded any judicial determina-

tion of his liability. In discussing the judicial remedy which the transferee might invoke by petition to the United States Board of Tax Appeals, an administrative tribunal, this Court said:

> "Specific objection is made * * * to the rule under which the Board's findings of fact are treated by that Court" (a Circuit Court of Appeals) "as final if there is any evidence to support them. * * * Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings," (pp. 599-600).

This rule applies to statements of fact in the opinion of the Board as well as to formal findings. Such statements, if based on substantial evidence, amount to determinations of fact:

California Barrel Company v. *Commissioner*, 81 Fed. 2nd 190 (193) (C. C. A. 9th Circuit).

B. *The conclusions of fact drawn by the Circuit Court of Appeals should be disregarded.*

The Circuit Court of Appeals concludes the discussion in its opinion in the instant case with the statement:— "It is our view that what was done, including the corporate organization, was a mere mask to cover the real transactions."

The drawing of such conclusions, and clearly it is a conclusion of fact and not of law, is not within the province of the Circuit Court of Appeals in such cases. As a rule, Circuit Courts of Appeals have been careful to avoid encroaching on the province of the United States Board of Tax Appeals in this respect. For example, in the case of *Von's Investment Co. Limited* v. *Commissioner*, 92 Fed.

2nd, 861 (C. C. A. 9th Cir.), the Circuit Court of Appeals for the Ninth Circuit, was passing on the question whether two transfers of similar stocks to a corporation, made some seven weeks apart, should be treated as "property transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation." (See 112 b-5 of Revenue Act of 1928.) The Court said that if both were made in furtherance of a plan embodied in a then existing contract, they might be treated as one transfer by "one or more persons." The Court added:

> "As to the intent or purpose with which these transfers were made, the Board made no finding. Such a finding is necessary to a proper decision of the case, and should be made by the Board, not by this court. In reviewing decisions of the Board, we are not authorized to make findings of fact. Our review is limited to questions of law" (Page 864).

and remanded the case to the Board for further findings.

The drawing of factual conclusions by Circuit Courts of Appeals, in such cases, has recently drawn sharp comment from this Court.

Thus, in *Elmhurst Cemetery Company* v. *Commissioner*, 300 U. S. 37, this Court reversed a decision of the Circuit Court of Appeals for the Seventh Circuit on the sole ground of such an encroachment on the functions of the Board:

> "This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board" (Page 40.)

Also in *Helvering* v. *Rankin*, 295 U. S. 123, the Court reversed a decision of the Circuit Court of Appeals for the Third Circuit, in which the Circuit Court had made certain assumptions of fact not justified by the Board's decision. There, as in the instant case, the Circuit Court

had not specified its departures from the Board's findings; but the departures are equally clear.

This Court said:

> "Thus it was only by departing from the facts as found by the Board of Tax Appeals that the court found justification for reversing the Board's decision. • • •
>
> "The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. • • •
>
> "Unless the finding of the Board involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board. If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. Compare *Helvering* v. *Taylor*, 293 U. S. 507, *ante*, 623, 55 S. Ct. 287; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 308, 77 L. ed. 318, 324, 53 S. Ct. 161. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record" (Pages 131-132).

We submit that in the instant case the Circuit Court's encroachment by the Court of the province of the Board of Tax Appeals is so clear that that alone requires a reversal of the decision. Furthermore, it is obvious that the Board's decision must be affirmed if its factual determination be accepted.

We respectfully request that the opinion of the Circuit Court of Appeals for the Seventh Circuit be reversed.

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